Micrometl Corporation *and* Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL–CIO. Cases 25–CA–24885, 25–CA–25293, and 25–CA–25603

April 26, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On June 19, 1998, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief in opposition to the General Counsel's exceptions. By notice dated June 23, 2000, the Board invited the parties to file supplemental briefs addressing the framework for analysis for refusal-to-consider and refusal-to-hire violations set forth in the Board's May 11, 2000 decision in *FES*, 331 NLRB 9. On July 13 and 20, 2000, respectively, the Respondent and the General Counsel filed their supplemental briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Raifael Williams and *Joanne C. Mages, Esqs.,* for the General Counsel.

Martin J. Klapper and *Michael L. Tooley, Esqs. (Ice, Miller, Donadio & Ryan),* of Indianapolis, Indiana, for the Respondent.

Michael E. Van Gordon, Organizer, of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On September 9, 1996, and February 28, 1997, the charge and first amended charge in Case 25–CA–24885 were filed. On April 10, 1997, and January 7, 1998, the charge and first amended charge in Case 25–CA–25293 were filed. On September 12, 1997, and January 7, 1998, the charge and first amended charge in Case 25–CA–25603 were filed. All charges and amended charges were filed by Sheet Metal Workers International Association Local Union No. 20, a/w Sheet Metal Workers International Association, AFL–CIO (Union), against Micrometl Corporation (Respondent).

On February 20, 1998, and March 2, 1998, the National Labor Relations Board, by the Regional Director for Region 25, issued an amended consolidated complaint and an amendment to amended consolidated complaint (collectively, the complaint), which allege, as further amended at the hearing, that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), when it informed an employee it would not hire applicants for employment who engaged in union activity, when it refused to hire or consider for hire 42 applicants for employment because of their union affiliation, when it discharged employee Ryan O. Witham, and when it granted each of its employees a bonus of $10.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Indianapolis, Indiana, on March 18, 19, and 20, 1998.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent and upon my observation of the witnesses and their demeanor I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times Respondent, a corporation, with an office and place of business in Indianapolis, Indiana, has been engaged in the manufacture of commercial rooftop accessories for the commercial heating, ventilation, and air-conditioning market.

Respondent admits, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel contends that seven nonunion applicants who had earned more than $10/hour at their previous (or current) jobs were granted interviews, and that this demonstrates that the Respondent treated nonunion applicants who made more than $10/hour in their previous (or current) jobs differently from similarly situated Union applicants insofar as only one of the alleged 42 discriminatees received an interview. The General Counsel's contention is without merit. It is unclear whether all of the seven nonunion applicants were actually interviewed, and the circumstances under which these interviews may have occurred are also unclear. For example, it appears that one of the seven individuals stated that his current hourly rate/salary "varies" without revealing his hourly rate/salary. Another individual appears to have listed his employment history in reverse order. A third individual did the same, and listed his weekly salary instead of his hourly rate/salary for his most recent job. Concededly, some of these seven applications contain a notation indicating that an applicant had been interviewed. However, as stated above, the General Counsel has not demonstrated what the circumstances of the interviews were and how many of the applicants were actually interviewed. In any event, the General Counsel has not demonstrated, through this contention, that there was disparate treatment of union and nonunion applicants.

II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Respondent's Refusal to Consider for Hire or Hire the Union Salts

This is a "salting" case. "Salting" is the name given to the practice of unions sending union members to nonunion employers seeking employment and once employed the "salt" tries to organize the employer.

In this particular case 42 overt "salts" applied for work with Respondent over a 1-year period. When applying for work these overt "salts" identified themselves on their job applications as union organizers. They were not hired. The General Counsel maintains that they were not hired because of their union affiliation and the refusal to hire or even consider them for hire was a violation of Section 8(a)(1) and (3) of the Act. See, e.g., *Walz Masonry,* 323 NLRB 1258 (1997) enfd. in unpublished opinion by the 8th Circuit on May 4, 1998, *Casey Electric*, 313 NLRB 774 (1995).

Respondent maintains, on the other hand, that it did not violate the Act in any way. Rather because of high turnover, namely, 8 out of 10 employees not staying past their 90-day probationary period, Respondent decided in late 1995 to hire no one who made more than $10 per hour on their last job. According to Lisa Tornes, Respondent's human resources manager, her study of the high turnover at Respondent's facility led her to recommend to higher management who adopted her recommendation that Respondent hire no one who made more than $10 per hour at their last job. According to Lisa Tornes, implementation of this policy for the 2 years it has been in effect resulted in reducing Respondent's turnover rate from 8 out of 10 not staying past 90 days to 6 out of 10 not staying. In other words, the retention rate doubled.

Tornes also testified that the only requirement to work for Respondent was that the applicant be 18 years of age or older. The nature of the work, classified as general laborer required no particular skills and paid $7 per hour to start. It is stipulated by the parties to this litigation that all the union applicants were 18 years of age or older when they applied and would have taken a job with Respondent if offered one. In addition it is clear and no one disputes the fact that the overt salts were amply qualified to work for Respondent, a sheet metal fabricator in the heating and air conditioning industry, and Respondent was hiring when they applied.

More specifically, on March 11, 1996, union applicants George R. Sears, Robert E. Sharp Jr., Anthony W. Smith, and Jesse W. Stamper Jr. applied for work with Respondent.

On March 25, 1996, union applicants Don A. Campbell, Lloyd T. Campbell, Eric J. Edwards, Darlene J. Haemmerle, Kevin A. Hechinger, Keith A. Peacher, Ryan M. Striby, and Frank J. Sullivan applied for work with Respondent.

On May 14, 1996, union applicant Tom Akers applied for work with Respondent.

On May 16, 1996, union applicant Jason A. Wiley applied for work with Respondent.

On July 31, 1996, union applicant Charles K. Clark applied for work with Respondent.

On October 10, 1996, union applicants Kenneth R. Brandon, Keith Allen Beatty, Dorian J. Wilson, Terry L. Netherton, Russell Dean Miller, and Kenneth Robert Weiner applied for work with Respondent.

On November 11, 1996, union applicants Kenneth E. Miller and William Martin Hovermale applied for work with Respondent.

On November 13, 1996, union applicants Dean Lynn Broyles, William Brian Shields, and Tony Allen Eldridge applied for work with Respondent.

On March 26, 1997, union applicants Terry Banks, Robert Bond Jr., Kerry Bowling, Jason Ellis, Robert Gandy, Eric Harris, James G. Holton, Spencer Irving III, Bruce Manley, Michael John Maynard, Charles W. Miller, James S. Snodgrass, Tony Turner, David A. Walker, Timothy A. Williamson, and James Wilson applied for work with Respondent.

The applications or testimony of all 42 overt salts reflected that they made more than $10 per hour on their last job.

Respondent had in its possession copies of the applications all but eight of the above applicants. These eight applicants testified as did a number of other applicants. I find that all 42 overt salts did apply for work with Respondent. Because of certain stipulations, e.g., the only requirement for the job was to be 18 years of age or older and all the union applicants were 18 or older, because Respondent's rationale for not hiring the union applicants was the fact that they made more than $10 per hour in their last job, that all the overt salts would have worked for Respondent if offered a position, and because we have in evidence the applications of all the alleged discriminatees or their testimony, I did not permit the General Counsel to call each and every one of the 42 overt salt discriminatees. The General Counsel filed a special appeal to my ruling which the Board denied on June 8, 1998, without prejudice to the right of the General Counsel to raise the same issues in any exceptions to my decision. In all 16 of the alleged overt salt discriminatees did testify.

The skills of the union applicants were never considered in the decision not to hire them. Rather, the fact that they made more than $10 per hour in their last job and *only* that factor kept them from being considered for employment.

Needless to say this rationale for not hiring the union applicants is suspect on its face because as all parties to these proceedings acknowledge applicants for employment who are union members will almost invariably have more than $10 an hour in their last employment.

Respondent's rationale can only pass muster if in fact it was uniformly applied. And, the evidence demonstrates that it was uniformly applied. During the relevant period from March 1996, when the first overt salts applied for work with Respondent to March 1998 when the hearing in this case began, Respondent hired 198 employees. All but two of the 198 had made less than $10 per hour in their prior job. The two exceptions were Paul Moore and Jerry Mintze. Moore had previously worked for Respondent and came highly recommended by some of Respondent's supervisors. Mintze had a brother and a nephew both working for Respondent. Exceptions to the policy were made in the case of only 2 out of 198, Moore and

Mintze, for unusual reasons. Interestingly enough both Moore and Mintze have since quit their employment with Respondent.

Respondent not only turned down the union applicants for employment but also rejected for employment during the relevant March 1996 to March 1998 timeframe over 1000 other applicants. Approximately 152 applicants for employment in this period were rejected because they made more than $10 per hour in their last job, to include the 42 union applicants in this case.

Respondent did not even interview applicants for employment whose applications reflected they made more than $10 per hour in their last job with one exception. That exception was union applicant Robert Sharpe. In filling out his application Sharpe had reversed the order of his employment history and it read from top down oldest to most recent employment whereas it should have read top down most recent to oldest. Suffice it to say Sharpe was interviewed by Lisa Tornes who read his oldest as his most recent employment. During the interview Sharpe let her know that the employer he listed as "SMWIA" was the union and his pay on his most recent job was over $10 per hour. Tornes claimed he wasn't hired because of the wage he made and not because he was union.

I found Lisa Tornes to be a credible witness and conclude that the policy she thought up (the so-called $10 rule) was implemented to reduce turnover, i.e., a legitimate business reason, and *not* as an excuse not to hire applicants for employment who were union members. Since Respondent failed to consider for hire or hire the union applicants for employment on grounds other than their union affiliation, the Act was not violated. Tornes, by the way, is the person who did all the hiring for Respondent. Obviously, if Respondent abandons its so-called $10 rule or overt salts who made $10 or less on their last job apply to work with Respondent another case may have a different result.

Had Respondent not implemented the $10 rule in an across the board manner I well might have concluded that the Act was violated.

There was, however, no evidence of union animus, e.g., a "smoking gun" memo that supported the implementation of the $10 rule on the grounds, among others, that it would enable Respondent to remain union free.

The only evidence of animus is a remark alleged to have been made by supervisor Darrell Hansell shortly before the discharge of employee Ryan Witham which is discussed below. I find that Hansell did not make the statement attributed to him.

It is stipulated that applicants for employment were *not* told of the so-called $10 rule and with respect to how long their applications would be active the applicants were told a variety of different time periods from 30 days to 90 days or simply not told at all how long their applications would be active.

B. The Discharge of Employee Ryan O. Witham

Salts generally are of two types, i.e., overt and covert. The overt salts are those who honestly and openly advise the employer when they apply for work that they are union members and they desire to organize Respondent's work force. None of the overt salts in this case were hired. Covert salts apply for work with a nonunion employer with the plan to organize the work force but conceal their union membership and their plan to organize at the time they apply for work. Ryan O. Witham was a covert salt. In late March 1996 Witham applied for a position paying $7 per hour with Respondent. His application did not reflect that he was affiliated with the union nor did it reflect that he made over $10 per hour in his last employment. Witham was interviewed, offered a job, and started work with Respondent on May 13, 1996. It is conceded by all parties to this litigation that he was a good worker.

On July 29, 1996 Witham approached his supervisor, Darrell Hansell, and told Hansell that he had falsified his application, that he was a union organizer and what was the Company going to do about it.

According to Witham, Hansell then said words to the effect that if Respondent knew Witham was union they would not have hired him. Hansell denies he said this. I credit Hansell over Witham. Both men testified and both have a motive to fabricate, i.e., Witham to help the union case and Hansell to withhold evidence of union animus. Based on their demeanor I find Hansell the more credible of the two.

Suffice it to say Hansell took Witham to see Jim Lindgren, vice president of operations for Respondent. Witham told Lindgren what he had told Hansell and further that before and after work he was going to hand out union literature and try to get Respondent's employees to sign union authorization cards. Witham went back to work.

Lindgren met with and discussed the Witham matter with Lisa Tornes, Respondent's human resources manager, who reported to Lindgren. They decided to terminate Witham because of his violation of a company rule which provided that an employee could be disciplined, up to discharge, for "theft or dishonesty of any kind." Respondent had no knowledge of any employee ever falsifying his or her application for employment so there was no history of anyone who worked for Respondent being fired for this. The falsification on Witham's application was that he put down he worked some place where he did not in fact work and he did it knowingly. On the other hand there was also no evidence that Respondent knew of any employee who lied on their application for employment and who was not fired.

Respondent pointed to what it claimed were three similar cases of "theft or dishonesty" and in each case they fired the individual, i.e., Wayne Brown was fired for clocking in and later being observed at a liquor store by a supervisor when Brown should have been working, Angela Hughes was fired for using a company phone to make 900 calls to a psychic hot line, and Francisco Rodarte was fired for falsely claiming he had been injured on the job whereas he had really been injured at home.

There was no evidence presented of Respondent being aware of any "theft or dishonesty" by any employee and *not* firing the employee.

In light of this evidence I conclude that Respondent did not violate the Act when it discharged Ryan O. Witham.

C. $10 Gift for Overtime

On July 31, 1996, Respondent presented each of its approximately 100 employees with a $10 cash bonus for working a lot of overtime. This minimal cash payment was made *after* Respondent found out that Ryan Witham was a union salt who

wanted to organize Respondent's employees but before Witham was discharged. Witham also received the $10 bonus.

Respondent presented evidence through the testimony of Vice President for Operations Jim Lindgren that he has responsibility for Respondent's two facilities. One facility is the Indianapolis facility which is the subject of this litigation and the other is a facility in Sparks, Nevada.

Because employees were working a lot of overtime in both facilities Respondent decided to make a cash payment as a bonus. There is a long history of Respondent's giving bonuses but never a *cash* bonus for overtime.

Suffice it to say Respondent gave $10 to each of its employees in Sparks, Nevada, on July 26, 1996, after deciding to do so on July 18, 1996. Respondent introduced a requisition for a sufficient number of $10 bills to pay its employees at both its Sparks, Nevada, and Indianapolis facilities.

On July 31, 1996, the employees at Respondent's Indianapolis facility each received a $10 bill and a thank you card for working alot of overtime.

Since it is conceded that Respondent's employees had been working a lot of overtime prior to the payment of the $10 bonus and since I find that the decision to pay the $10 was made prior to Respondent learning of Ryan Witham's intentions to organize and also prior to the filing of the charges in this case I conclude that Respondent did not violate the Act when it gave a $10 bonus on July 31, 1996, to its employees.

CONCLUSIONS OF LAW

1. Respondent Micrometl Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sheet Metal Workers' International Association Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The complaint is dismissed in its entirety.[2]

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] The General Counsel's unopposed motion to correct transcript is granted and, in addition, there being no objection the affidavit of M. John Maynard attached to the General Counsel's brief is ordered to be placed in General Counsel's Rejected Exhibit 18.